

**EXPLANATORY FICHE NO 6**

**NON-COMPLIANCE WITH CFP RULES BY MEMBER STATES**

**VERSION 1 – 28.03.2019**

**RELEVANT PROVISIONS IN THE DRAFT LEGISLATION**

<b>Regulation</b>	<b>Provisions</b>
<b>EMFF Proposal</b>	Article 33 on interruption of the payment deadline Article 34 on suspension of payments Article 36 on financial corrections by the Commission
<b>CPR Proposal</b>	Article 90 on interruption of the payment deadline Article 91 on suspension of payments Article 98 on financial corrections by the Commission

*This document is based on the text of the adopted Commission proposals for the new EMFF as well as for the Common Provisions Regulation. It is a provisional text, without prejudice to on-going discussions. This series of fiches is intended to guide Member States, explaining and elaborating the text of the proposal.*

## **OBJECTIVE OF THIS FICHE**

This fiche provides clarifications concerning compliance with CFP rules by Member States, and in particular:

- the legal basis and rationale behind this requirement,
- the applicable procedures, and
- the consequences on the EMFF funds in such cases.

## **LEGAL BASIS AND RATIONALE**

The impact-assessment accompanying the EMFF demonstrated that for stakeholders, a conditional approach to any future spending should continue to be linked to the delivery of CFP objectives.

The principle of conditioning financial assistance to Member States with compliance to CFP rules is included in the CFP Regulation 1380/2013, which lays down in its Art. 41 that “*Union financial assistance to Member States shall be conditional upon compliance with the CFP rules by Member States*”.

The rules regarding financial consequences on EMFF funds in case of non-compliance by Member States to CFP rules are laid down in Articles 33 to 36 of the EMFF proposal. Article 36 refers to financial corrections by the Commission in such cases. CPR rules complement this legislation in this regard. Financial consequences can be summarized in 3 different steps: the interruption of the payment deadline, the suspension of payments and the financial correction. In order to ensure continuity and a smooth transition between programming periods, these provisions are almost identical to those that exist in the current programming period.

### ***Step 1***

#### ***Article 33 of the EMFF Proposal:***

##### ***Interruption of the payment deadline***

1. *In accordance with Article 90(4) of Regulation (EU) No [Regulation laying down Common Provisions], the Commission may interrupt the payment deadline for all or part of a payment application in the case of evidence of non-compliance by a Member State with the rules applicable under the CFP, if the non-compliance is liable to affect the expenditure contained in a payment application for which the interim payment is requested.*
2. *Prior to the interruption referred to in paragraph 1, the Commission shall inform the Member State concerned about the evidence of non-compliance and give it the opportunity to present observations within a reasonable period of time.*
3. *The interruption referred to in paragraph 1 shall be proportionate, having regard to the nature, gravity, duration and repetition of the non-compliance.*
4. *The Commission shall be empowered to adopt delegated acts, in accordance with Article 52, defining the cases of non-compliance referred to in paragraph 1.*

**Step 1**

**Article 90 of the CPR Proposal**

***Interruption of the payment deadline***

1. The Commission may interrupt the payment deadline for payments, except for pre-financing, for a maximum period of six months where any of the following conditions is met:
  - a) there is evidence to suggest a serious deficiency and for which corrective measures have not been taken;
  - b) the Commission has to carry out additional verifications following receipt of information that expenditure in a payment application may be linked to an irregularity.
2. The Member State may agree to extend the interruption period by three months.
3. The Commission shall limit the interruption to the part of the expenditure affected by the elements referred to in paragraph 1, unless it is not possible to identify the part of the expenditure affected. The Commission shall inform the Member State in writing of the reason for interruption and shall ask them to remedy the situation. The Commission shall end the interruption as soon as the measures remedying the elements referred to in paragraph 1 have been taken.
4. The Fund-specific rules for the EMFF may lay down **specific bases for interruption of payments linked to non-compliance with rules applicable under the Common Fisheries Policy.**

**Step 2**

**Article 34 of the EMFF Proposal**

***Suspension of payments***

1. In accordance with Article 91(3) of Regulation (EU) No [Regulation laying down Common Provisions], **the Commission may adopt implementing acts suspending all or part of the interim payments under the programme in the case of serious non-compliance** by a Member State with the rules applicable under the CFP, if the serious non-compliance is liable to affect the expenditure contained in a payment application for which the interim payment is requested.
2. Prior to the suspension referred to in paragraph 1, **the Commission shall inform the Member State that the Commission considers that there is a case of serious non-compliance** with the rules applicable under the CFP and give it opportunity to present observations within a reasonable period of time.
3. The suspension referred to in paragraph 1 shall be proportionate, having regard to the nature, gravity, duration and repetition of the serious non-compliance.
4. The Commission shall be empowered **to adopt delegated acts, in accordance with Article 52, defining the cases of serious non-compliance** referred to in paragraph 1.

**Step 2**

**Article 91 of the CPR Proposal**

***Suspension of payments***

1. The Commission may suspend all or part of payments after having given the Member State the opportunity to present its observations, if any of the following conditions is met:
  - a) the Member State has failed to take the necessary action to remedy the situation giving rise to an interruption under Article 90;
  - b) there is a serious deficiency;
  - c) the expenditure in payment applications is linked to an irregularity that has not been corrected;
  - d) there is a reasoned opinion by the Commission in respect of an infringement under Article 258 of the TFEU that puts at risk the legality and regularity of expenditure

- e) *the Member State has failed to take the necessary action in accordance with Article 15(6).*
2. *The Commission shall end the suspension of all or part of payments when the Member State has taken the measures remedying the elements referred to in paragraph 1.*
3. ***The Fund-specific rules for the EMFF may lay down specific bases for suspension of payments linked to non-compliance with rules applicable under the Common Fisheries Policy.***

### **Step 3**

#### **Article 36 of the EMFF Proposal**

##### **Financial corrections by the Commission**

1. *In accordance with Article 98(5) of Regulation (EU) No [Regulation laying down Common Provisions], the Commission shall adopt implementing acts making financial corrections by cancelling all or part of the Union contribution to a programme if, after carrying out the necessary examination, it concludes that:*
- a) *expenditure contained in a payment application is affected by cases in which the beneficiary does not respect the obligations referred to in Article 12(2) and has not been corrected by the Member State prior to the opening of the correction procedure under this paragraph;*
- b) *expenditure contained in a payment application is affected by cases of serious non-compliance with the rules of the CFP by the Member State which have resulted in the suspension of payment under Article 34 and the Member State concerned still fails to demonstrate that it has taken the necessary remedial action to ensure compliance with and the enforcement of applicable rules in the future.*
2. *The Commission shall decide on the amount of the correction taking into account the nature, gravity, duration and repetition of the serious non-compliance by the Member State or beneficiary with the rules of the CFP and the importance of the EMFF contribution to the economic activity of the beneficiary concerned.*
3. *Where it is not possible to quantify precisely the amount of expenditure linked to non-compliance with the rules of the CFP by the Member State, the Commission shall apply a flat rate or extrapolated financial correction in accordance with paragraph 4.*
4. *The Commission shall be empowered to adopt delegated acts, in accordance with Article 52, determining the criteria for establishing the level of financial correction to be applied and the criteria for applying flat rates or extrapolated financial corrections.*

### **Step 3**

#### **Article 98 of the CPR Proposal**

##### **Financial corrections by the Commission**

1. *The Commission shall make financial corrections by reducing support from the Funds to a programme where it concludes that:*
- a) *there is a serious deficiency which has put at risk the support from the Funds already paid to the programme;*
- b) *expenditure contained in accepted accounts is irregular and was not detected and reported by the Member State;*
- c) *the Member State has not complied with its obligations under Article 91 prior to the opening of the financial correction procedure by the Commission. Where the Commission applies flat-rate or extrapolated financial corrections, this shall be carried out in accordance with Annex XXI.*
2. *Before taking a decision on a financial correction, the Commission shall inform the Member State of its conclusions and give the Member State the opportunity to present its observations within two months.*

3. *Where the Member State does not accept the conclusions of the Commission, the Member State shall be invited to a hearing by the Commission, in order to ensure that all relevant information and observations are available to form the basis for Commission conclusions on the application of the financial correction.*
4. *The Commission shall decide on a financial correction by means of an implementing act within 12 months of the hearing or from submission of additional information as required by the Commission. When deciding on a financial correction, the Commission shall take account of all information and observations submitted. Where a Member States agrees to the financial correction for cases referred to in points (a) and (c) of paragraph 1 before the adoption of the decision referred to in paragraph 1, the Member State may reuse the amounts concerned. This possibility shall not apply to financial correction for cases referred to in (b) of paragraph 1.*
5. *The Fund-specific rules for the EMFF may lay down specific bases for financial corrections by the Commission linked to non-compliance with rules applicable under the Common Fisheries Policy.*

### **CONTENT AND COMPARISON WITH THE CURRENT EMFF**

The content of the articles dealing with non-compliance with CFP rules by Member States in the EMFF proposal are very similar to existing provisions in the current EMFF. Only very few changes were introduced for sake of simplification and alignment with applicable rules, which are described below.

#### **A. Which procedure will apply in case of non-compliance to CFP rules by Member States?**

Under the current EMFF, cases of non-compliance to CFP rules that may trigger the interruption of the payment deadline are laid out in a Delegated Regulation<sup>1</sup>. In the EMFF proposal, it is similarly proposed to empower the Commission to adopt delegated acts defining the cases of non-compliance.

The applicable procedure in such cases starts with the **interruption of the payment deadline** in accordance with Art. 33 of the EMFF proposal: as soon as a payment application is submitted by the Member State to the Commission where full or part of the expenditure are affected by the non-compliance, the Commission **may interrupt the payment deadline** of that payment application. This means that the Commission will stop the clock counting the payment deadline containing the expenditure likely to be affected by the **case of non-compliance**. Before doing so, the Commission is obliged to inform the Member State about the evidence of non-compliance and give the Member State the opportunity to present its observations.

It has to be noted that:

- the interruption of a payment deadline under shared management consists only in stopping a clock which counts the number of days by which the Commission proceeds with the treatment of a financial claim. It is a precautionary measure that gives Member States the time needed to provide the Commission with satisfactory explanation of the situation or to deal with the case of non-compliance.
- The clock restarts as soon as the Member State has presented its observations.

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<sup>1</sup> Delegated Regulation 2015/852 of 25 March 2015 (OJ L 135, 2.6.2015, p. 13)

- If only part of the payment claim is concerned by the case of non-compliance and if the rest of the payment claim is in conformity with applicable rules and can be reimbursed, it is possible to proceed with the payment of the rest of the claim.
- The interruption shall be proportionate, having regard to the nature, gravity, duration and repetition of the non-compliance.

Art. 33 of the EMFF Proposal is nearly the same as Art. 100 of the current EMFF. The only difference is that the interruption of the payment deadline does not require anymore the adoption of a Commission implementing act<sup>2</sup>. In addition, the current wording in Art. 100 of the EMFF “*evidence suggesting non-compliance with obligations under the CFP*” has been replaced in the current proposal by “*evidence of non-compliance by A Member State with the rules applicable under the CFP*” for the reason of legal clarity and certainty.

### **B. What are the cases of serious non-compliance and which procedure will apply?**

In the current EMFF, cases of serious non-compliance are defined as the **cases of non-compliance** that triggered the interruption of the payment deadline and **for which the Member State has failed to take the necessary action to remedy the situation within the period of interruption** of the payment deadline.<sup>3</sup>

**The Commission intends to propose the same definition for cases of serious non-compliance for the next EMFF:** only cases of non-compliance having given rise to an interruption of the payment deadline and for which no remedial action was taken during the interruption period will be considered as cases of serious non-compliance.

The applicable procedure is the **suspension of payments:** the Commission **may adopt an implementing act suspending all or part of the payment.** Before doing so, the Commission has to **inform the Member State** that it considers that there is **a case of serious non-compliance** and give it the opportunity to present its observations.

It should be noted that:

- the Commission is obliged to lift the suspension of all or part of the payments when the Member State has taken the necessary remedial measures. This can be done through a simple letter to the Member State concerned.
- If only part of the payment claim was concerned by the case of non-compliance, only part of the payment claim might be subject to the suspension of payments.
- The suspension shall be proportionate, having regard to the nature, gravity, duration and repetition of the serious non-compliance.

Art. 34 of the EMFF proposal is nearly the same as Art. 101 of the current EMFF. The only difference is that the adoption of a Commission implementing act recognizing that a Member State has failed to comply with its obligations under the CFP is not necessary any more. The Commission has however to inform the Member State that it considers that there is a case of serious non-compliance. Only the suspension of all or part of payments will be subject to a Commission implementing act. As in the case of interruption of the payment deadline, this is in conformity with Art. 63(8) of the Financial Regulation and with Art. 91 of the Commission proposal on the CPR.

<sup>2</sup> This is in conformity with Art. 63(8) of the Financial Regulation and Art. 90 of the Commission proposal on the CPR.

<sup>3</sup> See Article 2 of Delegated Regulation 2015/852.

### **C. What are the cases where financial corrections are done by the Commission?**

Such cases are **those cases of serious non-compliance** for which the **Member State concerned still fails to demonstrate that it has taken the necessary remedial action during the suspension period** to ensure compliance with and the enforcement of applicable rules in the future. As in the current programming period, **the Commission has to adopt an implementing act** making financial corrections by cancelling all or part of the Union contribution to the programme concerned.

It should be noted that:

- Before taking a decision on a financial correction, the Commission is obliged inform the Member State of its conclusions and give the Member State the opportunity to present its observations within two months.
- In accordance with Article 98 of the CPR proposal, when doing financial corrections, the Commission has to respect the principle of proportionality by taking into account the nature, gravity and frequency of irregularities and their financial implications for the budget of the Union.
- Where it is not possible to quantify precisely the amount of expenditure linked to the non-compliance with CFP rules, a flat rate financial correction is to be applied.
- Before taking a decision on a financial correction, the Commission is obliged to inform the Member State of its conclusions and give the Member State the opportunity to present its observations within two months.

Art. 36 of the EMFF proposal is exactly the same as Art. 105 of the current EMFF. As in the current programming period, it is proposed to empower the Commission to adopt a delegated act determining the criteria for establishing the level of financial correction to be applied and the criteria for applying flat rates or extrapolated financial corrections<sup>4</sup>.

### **NEXT LEGAL ACTS TO BE PREPARED BY THE COMMISSION**

The EMFF proposal contains empowerments for the Commission for the following delegated acts:

- Defining the cases of non-compliance (as in the current EMFF),
- Defining the cases of serious non-compliance (as in the current EMFF),
- Determining the criteria for establishing the level of financial correction to be applied as well as the criteria for applying flat rates or extrapolated corrections in the context of financial corrections (as in the current EMFF).

These are identical provisions (and empowerments) to those contained in the current (2014-2020) programming period.

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<sup>4</sup> See Commission Delegated Regulation 2015/1930 of 28 July 2015 (OJ L 282, 28.10.2015, p.2).